BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CLARENCE RIGHTNOUR
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-95
Case No. 70-2173

S.S.A. No.

GRISWOLD & WIGHT
(Employer)

Employer Account No.

The claimant appealed from Referee's Decision No. S-TD-199 which held that he was ineligible for unemployment insurance benefits beginning January 25, 1970 under section 1262 of the Unemployment Insurance Code on the ground that he left his work because of a trade dispute and continued out of work by reason of the fact that the trade dispute is still in active progress at the establishment at which he was employed. Both the representative of the employer and the attorney for the claimant submitted written argument to which we have given consideration.

STATEMENT OF FACTS

The claimant worked as a mechanic for the above identified employer for approximately two and one-half months. He is a member of the union which called a strike against the employer on October 8, 1969 and established a picket line at the employer's establishment. The claimant refused to cross the picket line and did not continue working after October 7, 1969.

Subsequent to the beginning of the trade dispute the claimant secured employment through his union as a mechanic for an automobile firm in Turlock, California.

He was employed at that place for approximately two and one-half months when he was laid off for lack of work on January 13, 1970. He filed a claim for unemployment insurance benefits which was made effective January 25, 1970.

The claimant's home is in Salida, California and has been since 1953. Salida is seven miles from Modesto and 20 miles from Turlock. Although the claimant has not made any offer to return to work, he always has had the intention of returning to work with the above identified employer when the trade dispute ends and so testified at the hearing before the referee.

On October 8, 1969 the employer addressed a letter to the employees on strike which provides in part:

> "The management of this Company intends to remain open for business. This takes employees and for this purpose we request you return to work immediately.
>
> "We regret we must tell you that your failure to respond to our request may make it necessary for this Company to seek your replacement. If you have already returned to work or are not at work because of an excused absence, please disregard this letter."

The attorney for the claimant contends that the proper construction to be given to that letter was that the claimant reasonably believed that he had been or soon would be replaced after October 8, 1969.

REASONS FOR DECISION

Section 1262 of the code provides as follows:

> "1262. An individual is not eligible for unemployment compensation benefits, and no such benefits shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

In Mark Hopkins, Inc. v. California Employment Commission (1944), 24 Cal. 2d 744, the California Supreme Court established certain tests to be applied in determining when employment secured by a claimant during the progress of a trade dispute operates to sever the causal connection between his unemployment and the trade dispute, resulting in the removal of the determination of eligibility under section 1262 of the code. In such case the court stated as follows:

> "The termination of a claimant's disqualification by subsequent employment thus depends on whether it breaks the continuity of the claimant's unemployment and the causal connection between his unemployment and the trade dispute. Such employment must be bona fide and not a device to circumvent the statute. It must sever completely the relation between the striking employee and his former employer. The strike itself simply suspends the employer-employee relationship but does not terminate it. . . . If bona fide /employment/, it completely replaces the claimant's former employment, terminating whatever relation existed between the claimant and his former employer. It must be judged prospectively rather than retrospectively, with regard to the character of the employment, how it was obtained, and whether it was in the regular course of the employer's business and the customary occupation of the claimant." (citations omitted)

In the present matter the trade dispute continued after the claimant's layoff from the motor company in Turlock. The claimant did not return or make an offer to return to employment with the above identified employer, although he intended to return after the termination of the trade dispute. Therefore, it is evident that there was no intention on the part of the claimant to terminate his employment relationship by subsequent work and he remains ineligible for benefits under section 1262 of the code.

Some consideration must be given to the contention of the attorney for the claimant that the claimant reasonably believed that he had been or soon would be released after October 8, 1969 because of the letter directed to all employees who were participating in the trade dispute.

In Thomas v. California Stabilization Commission (1952), 39 C. 2d 501, 247 P. 2d 561, the Supreme Court of the State of California considered a situation similar to the present one. In that case there was also a trade dispute. After the plant was closed, each of the claimants received from the company a notice entitled "employment termination" which was signed by the company's foreman and stated that the date "terminated" was January 18, 1946. There was testimony that the company did not intend to discharge the claimants but only to terminate their "continuous employment period" for purposes of the company's bonus plan. There was evidence that the employees continued to participate in the picket line subsequent to their receipt of the notice of termination of employment. In deciding the case the court stated:

> "A more difficult question is presented as to whether there is any substantial evidence which supports the determination of the trial court that the discharge of claimants by the company was the direct and proximate cause of each claimant being unemployed after January 18, 1946. There appears to be no conflict in the evidence with respect to the events which transpired insofar as this phase of the case is concerned. Claimants refused to pass the picket line which the logging employees established around the company's sawmill, and, as we have seen, it is undisputed that this refusal operated to disqualify claimants from receiving benefits for the period of their unemployment prior to January 18. The picket line, as well as the trade dispute between the logging employees and the company, continued after that date and during the entire period for which claimants seek benefits. Four of the six claimants who testified in the administrative proceeding admitted that they participated in the picket line after they were discharged.

"There is no evidence in the record indicating that the termination notices caused claimants to remain out of work after January 18, or had anything to do with their determination to remain away from their jobs. None of the claimants who appeared as witnesses testified that he would have returned to work if he had not been discharged or that he would have been willing to cross the picket line. To the contrary, claimants did not respond to two notices given by the company to all employees on or about January 21 and February 18 requesting that they return to work immediately or as soon as strike conditions cease to exist.

"Under the circumstances presented by the record in this case the only reasonable conclusion is that claimants remained out of work after January 18 as well as before that date because they were unwilling to cross the picket line which was maintained by the logging employees in their trade dispute with the company. Accordingly, claimants were disqualified under section 56 of the act from receiving unemployment insurance benefits."

This case may be contrasted with Ruberoid Company v. California Unemployment Insurance Appeals Board (1963), 59 C. 2d 73, 27 Cal. Rptr. 878, 38 P. 2d 102. In that case the employer sent the employees a letter on October 2, 1958 stating that it intended to resume operations and all employees who did not return to work on or before October 7, 1958 would be permanently replaced. On October 17, 1958 the employer mailed to all employees who were still on strike notices that they had been permanently replaced and enclosed a check for their pro rata vacation pay to the date of the strike.

In deciding the case the Supreme Court of the State of California stated in part:

"In the instant case neither the volitional nor causational test operates to bar claimants. Although the trial court rendered a contrary decision, the facts here are not

in dispute, and we are not bound by its conclusions. We must here ascertain the proper conclusion indicated by the probative facts presented by the record. As we said in Mark Hopkins, Inc., supra, 'A legal conclusion clearly based on findings of probative facts requiring a different conclusion is invalidated by such probative facts. /Citing cases./' (P. 751.)

"As to the first test, that of volition, the employee here could hardly voluntarily remain away from a job that had ceased to exist. Here the employer's discharge and replacement of the striking employee precluded the exercise of his volition. The worker could no longer choose to return to the waiting job or remain on strike. In permanently filling the job the employer foreclosed the option. Whether or not the employee would thereafter have left or crossed the picket line to fill the job became a moot and academic question.

"Turning to the test of proximate causation, we believe that the trade dispute did not serve as the proximate cause of the unemployment after the employer permanently replaced the striking employees and severed his relationship with them. In analyzing the corollary situation in which the striking employee thereafter accepts permanent employment, we have held that such employee's permanent full-time employment terminates the former relationship and the disqualification. Thus in Mark Hopkins, Inc. v. California Emp. Com. (1944), supra, 24 Cal. 2d 744, Justice Traynor pointed out: 'Only permanent full-time employment can terminate the disqualification. If bona fide, it completely replaces the claimant's former employment, terminating whatever relation existed between the claimant and his former employer. . . .' (P. 749.) (See Feldman, The Garden of Live Flowers: Terminating the Trade Dispute Disqualification under the California Unemployment Insurance Act (1953) 27 So. Cal. L. Rev. 3, 33 et seq.) The employer's permanent replacement of the employee operates in the same manner."

In the present matter it is readily seen that the situation more nearly approximates the situation in the Thomas case. A mere threat to possibly replace, or actual replacement, unless permanent in nature does not serve to terminate an employment relationship. It was not the notice that he may be replaced which deterred the claimant from returning to work for the employer but his refusal to cross the picket line. Therefore, there has been no indication that his unemployment is due to anything other than the fact that he is still observing the strike. Consequently, he is ineligible for benefits under section 1262 of the code.

DECISION

The decision of the referee is affirmed. The claimant is ineligible for benefits under section 1262 of the code.

Sacramento, California, January 19, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

We do not agree with the conclusions reached by our colleagues in this matter and would hold that the claimant's unemployment at the time he filed his claim for benefits was involuntary because of his layoff for lack of work from his most recent employer. We also do not agree with the language of the majority opinion which states:

> ". . . A mere threat to possibly replace, or actual replacement, unless permanent in nature does not serve to terminate an employment relationship. . . ."

In our opinion it is not the actual wording of the letter warning a striking employee of the possibility of replacement that is important, but whether a claimant reasonably acted upon the notification and reasonably believed that he had been replaced. The majority opinion also states that the case is controlled by the Thomas case. In our opinion the controlling case in this matter is the Ruberoid case which has a substantial citation in the majority opinion. The claimant testified that he would return to work for Griswold & Wight if and when the strike came to an end, but believed he was no longer in employment because of the notice of replacement. There is nothing in the record to refute the claimant's testimony. Consequently, we would find that he was not ineligible for benefits under section 1262 of the code.

LOWELL NELSON

DON BLEWETT